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Supreme Court, U.S.
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No. 02-1500

In The
Supreme Court of the United States

HAROLD D. EYL, an individual,

Petitioner,

vs.

CIBA-GEIGY CORPORATION, a New York Corporation, and NORTHEAST COOPERATIVE, a Cooperative Association, and THE CITY OF WISNER, a Political Subdivision,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Nebraska

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Nebraska Supreme Court erred in holding, consistent with the unanimous decisions of federal circuits and virtually unanimous decisions of state appellate courts, that FIFRA preempts Petitioner's failure-to-warn and other labeling-related state damages actions?

STATEMENT PURSUANT TO RULE 29.6

Respondent Ciba-Geigy Corporation, the Plant Protection Division of which, is now known as Syngenta Crop Protection, Inc., formerly known as Novartis Crop Protection, Inc. Syngenta Seeds, Inc. is the parent corporation of Syngenta Crop Protection, Inc. No publicly held company owns 10% or more of the stock of Syngenta Seeds, Inc.

The other Respondent is Northeast Cooperative, a Nebraska Cooperative. There are no parent corporations or publicly held companies owning 10% of Respondent's stock.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

Petitioner candidly admits that a *"large majority of* FIFRA preemption decisions" hold that the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. §136v *et seq.*, expressly preempts state law damages claims that challenge the labeling of a pesticide approved by the United States Environmental Protection Agency ("EPA"). Pet. at 14 (emphasis added). Indeed, every Court of Appeals to address the question since this Court's seminal express preemption opinion in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) has concluded common law labeling based failure-to-warn claims are preempted by FIFRA. The overwhelming majority of state appellate court decisions also hold that FIFRA preempts common law label-based causes of action. Thus, Petitioner asks this Court to grant the petition for a writ of certiorari despite unanimous circuit court precedent and nearly unanimous state court precedent.

The appellate authority described above is not only virtually unanimous, but also correct. FIFRA provides EPA exclusive authority concerning pesticide labeling. To promote national uniformity FIFRA expressly prohibits the states from imposing any "requirements for labeling . . . in addition to or different from those required under FIFRA." 7 U.S.C. §136v(b). Because Petitioner's action against Respondents seeks to impose a common law labeling requirement on Pramitol 5PS that would be "in addition to or different from" that required by EPA under FIFRA, the Nebraska Supreme Court correctly held that FIFRA preempts Petitioner's action.

STATEMENT OF THE CASE

Petitioner Harold D. Eyl brought this product liability action asserting failure-to-warn theories as a result of his exposure through his work boots to Pramitol 5PS ("Pramitol"), a pelleted herbicide manufactured by respondent Ciba-Geigy Corporation ("Ciba-Geigy") and sold by respondent Northeast Cooperative ("Northeast Coop") to petitioner's employer, the City of Wisner.

Pramitol is subject to the registration and approval process provided by the Federal Insecticide, Fungicide and Rodenticide Act, ("FIFRA"), 7 U.S.C §§136-136(y). It is undisputed Ciba-Geigy complied with all of the labeling and testing requirements required by the United States Environmental Protection Agency for the registration of Pramitol for use as a herbicide. (E154, 1:52) It is also undisputed the EPA had specifically approved the information and cautionary statements contained on the label for Pramitol prior to Mr. Eyl's alleged exposure. (E154, 4:52; 801:13-804:7; 858:4-12)

HISTORICAL AND REGULATORY BACKGROUND OF FIFRA

FIFRA was enacted in 1947 to give the United States Department of Agriculture regulatory authority over pesticide labeling and packaging. In 1972, FIFRA was transformed into a "comprehensive-regulatory statute" governing the use, sale, and labeling of pesticides. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984). As part of this comprehensive regulatory scheme, Congress recognized "that pesticides – many of which can be poisonous to humans as well as to target pests – 'have both beneficial and deleterious' effects, and it designated the Administrator of

the EPA as the party to conduct the necessary balancing analysis." *Papas v. Upjohn,* 926 F.2d 1019, 1022 (11th Cir. 1991) ("*Papas I*"), *aff'd after remand* ("*Papas II*") 985 F.2d 516 (11th Cir. 1993), (quoting S. Rep. No. 92-838, 92nd Cong., 2d Sess., *reprinted in* 1972 U.S.C. Code Cong. & Admin. News 3993, 3996). In addition, and in furtherance of one of the principal objectives of FIFRA to "achiev[e] uniformity of labeling across the nation" (*Papas I*, 926 F.2d at 1025), Congress expressly added to the statute section 136v, which preempts state regulation of pesticide labeling and packaging. 7 U.S.C. §136v(b).

The cornerstone of federal pesticide regulation is FIFRA's requirement that all pesticides sold or distributed in the United States must be registered with the Administrator of the EPA. 7 U.S.C. §136a(a). The EPA may register a pesticide only if it meets all of the following criteria: (a) its composition is such as to warrant the proposed claims for it; (b) its labeling and other material required to be submitted comply with the requirements of FIFRA; (c) it will perform its intended function without unreasonable adverse effects on the environment; and (d) when used in accordance with widespread and commonly recognized practice, it will not generally cause unreasonable adverse effects on the environment. 7 U.S.C. §136a(c)(5). Environment is defined broadly and includes all plants and human beings. 7 U.S.C. §136(j).

In registering any pesticide, the EPA must make a determination that the product poses no unreasonable adverse effects when properly applied and that its packaging, testing, and accompanying labeling comply with the EPA's requirements to avoid unreasonable adverse effects when the product is "used in accordance with widespread and commonly recognized practice." 7 U.S.C. §136a(c)(5). More specifically, the EPA must make a determination

that the product does not pose any "unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of [its] use." 7 U.S.C. §136(bb).

To enable the EPA to discharge its Congressionally-delegated risk analyses in the national interest, the process by which pesticides are accepted or rejected for federal registration is purposefully laborious. A manufacturer must submit proposed labeling and instructions for a pesticide immediately upon application for registration. 7 U.S.C. §136a(c)(1)(C). An applicant for registration of a pesticide must also file a statement which includes the complete formula of the pesticide. 7 U.S.C. §136a(c)(1)(D).

The EPA Administrator then undertakes a comprehensive review of all pertinent data and determines whether the data is sufficient to satisfy the requirements of FIFRA. 40 C.F.R. §158.80(a) (1998). Accordingly, the EPA requires a battery of studies, the results of which must be submitted during the application process in order to allow the EPA "to make regulatory judgments about the risks and benefits" of a product and to determine whether it should be approved for registration under FIFRA. 40 C.F.R. §158.20(b). Data required by 40 C.F.R. §158 includes "product chemistry, residue chemistry, environmental fate, toxicology, reentry protection, aerial drift evaluation, wildlife and aquatic organisms [and] plant protection" among other categories. 40 C.F.R. §158.20(c).

The EPA even imposes elaborate "Good Laboratory Practice Standards" "to assure the quality and integrity" of the data it requires. *See, e.g.,* 40 C.F.R. §§160.1-160.195. Excruciatingly detailed "standards for conducting acceptable tests, guidance on evaluation and reporting of data . . . and examples of protocols . . . [are] available in advisory

documents (collectively referred to as Pesticide Assessment Guidelines)." 40 C.F.R. §158.20(c).

To confirm and verify that the data it receives are valid and reliable, Congress has required the EPA to conduct and/or sponsor independent scientific research. 7 U.S.C. §136r(a)-(c). Furthermore, and among other measures, Congress requires the EPA to submit its actions, decisions and regulations under FIFRA to an independent scientific advisory panel, assisted by a 60-scientist, multi-disciplinary Science Review Board, for oversight and to otherwise submit its research and findings to true scientific peer review. 7 U.S.C. §136d(b); 7 U.S.C. §136w(d)-(e).

To make certain that the EPA continuously receives up-to-date information regarding new scientific analyses and receives reports of any problems or unforeseen risks associated with a pesticide's actual use in the field, FIFRA requires registrants to submit "additional factual information regarding unreasonable adverse effects on the environment." 7 U.S.C. §136d(a)(2). The EPA has promulgated comprehensive regulations requiring timely submission of supplemental scientific data and the reporting of alleged adverse incidents. *E.g.*, 40 C.F.R. §§159.158 & 159.184.

To accommodate and address issues of local concern, "like climate, population, geography, and water supply," *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 614 (1991), "FIFRA implies a regulatory partnership between federal, state and local governments." *Id.* at 615. However, "[t]here is no indication that any coordination which the statute seeks to promote extends beyond the matters with which it deals. . . ." *Id.* Accordingly, state legislatures and administrative agencies may undertake their own risk/benefit analyses to address local concerns and promulgate their own regulations on the sale and use of federally registered pesticides under the authority reserved to

the states pursuant to 7 U.S.C. §136v(a). But, "there is no indication" that this comprehensive federal/state regulatory partnership comprehends an additional layer of judicial "regulation" beyond the mechanisms expressly provided within FIFRA itself and its correspondent state legislative and administrative programs. This point bears strongly on the proper construction of the careful balance of federal and state regulatory authority established by 7 U.S.C. §136v(a) as limited by 7 U.S.C. §136v(b).

FIFRA's LABELING REQUIREMENTS

Because of the crucial role that product labeling plays in the registration process, the EPA heavily regulates both the design and the content of the label for a registered pesticide. 40 C.F.R. §156.10. *See Papas I,* 926 F.2d at 1024. In general, the regulations mandate that all words and illustrations on the label be "clearly legible to a person with normal vision," and placed in a manner and expressed in such terms "as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use." 40 C.F.R. §156.10(a)(2). The regulations prohibit any disclaimers which would negate or detract from the labeling statements. 40 C.F.R. §156.10(a)(5)(viii). Any claims as to the safety of the pesticide are prohibited. 40 C.F.R. §156.10(a)(5)(ix).

The EPA regulations also contain "[s]pecific requirements concerning content, placement, type size, and prominence" of "[w]arnings and precautionary statements." 40 C.F.R. §156.10(h). The text required on the front panel of the label is determined by the toxicity category of the pesticide. 40 C.F.R. §156.10(h)(1). Significantly, the manufacturer is not free to use a signal word associated with a higher toxicity category unless the EPA determines

"that such label is necessary to prevent unreasonable adverse effects on man or the environment." 40 C.F.R. §156.10(h)(1)(i)(E).

The labeling must also contain directions for the use of any registered pesticide. 40 C.F.R. §156.10(i). The regulations specifically require that the directions for use "*must be adequate to protect the public . . . from personal injury* and to prevent unreasonable adverse effects on the environment." 40 C.F.R. §156.10(i)(1)(i) (emphasis added). The EPA regulates both the placement (40 C.F.R. §156.10(i)(1)(ii)) and the content (40 C.F.R. §156.10(i)(2)) of the directions for use. The content of the directions for use must include, for example, "[t]he method of application, including instructions for dilution, if required, and type(s) of application apparatus or equipment required," and "[t]he frequency and timing of applications necessary to obtain effective results without causing unreasonable adverse effects on the environment." 40 C.F.R. §156.10(i)(2)(vi)-(vii).

The final printed labeling for a pesticide must be submitted and accepted by the Administrator before registration. 40 C.F.R. §156.10(a)(6). Once the EPA approves a label, the manufacturer may not change it without the agency's approval. *Worm v. American Cyanamid Co.* 5 F.3d 744, 747 (4th Cir. 1993). The EPA will not register any pesticide until it first "has determined that the product is not misbranded as that term is defined in FIFRA . . . and its labeling and packaging comply with the applicable requirements of the Act [and its implementing regulations]." 40 C.F.R. §152.112(f).

STATEMENT OF FACTS

Petitioner Harold D. Eyl, an employee of the City of Wisner, testified at trial he was exposed to Pramitol on Thursday, April 9, 1993 while working on a River Park playground project located in Wisner, Nebraska. While there is no evidence how much Pramitol was applied, the directions for its use provide that between 0.35 and 0.92 pounds be applied per one-hundred square feet, depending upon the type of weeds and grass to be controlled. (E154, 3:52) It was clear Mr. Eyl was present when the Pramitol was applied and was in charge of the crew when his boss was not on the jobsite. (1020:11; 1040:8-14)

Although Mr. Eyl testified he began to develop symptoms of itching, redness and swelling Sunday night or early Monday morning, the records of his treating physician, Dr. Thomas Tibbles, contain a handwritten note by Dr. Tibbels' nurse of "past two weeks – getting worse." (E212, 1:59; 110:10-15) According to Dr. Tibbels, the notation was based on the history Mr. Eyl had given Dr. Tibbels' nurse regarding the onset of his symptoms. (113:18-114:3)

Dr. Tibbels testified at trial, but not in his deposition (166:25), his notes were incorrect. He said after talking with Mr. Eyl "in the course of this case," Dr. Tibbels remembered Mr. Eyl called him on Sunday night and told Dr. Tibbels his symptoms started Saturday night and got worse all day Sunday. (114:10-16)

On Tuesday morning, Mr. Eyl came to Dr. Tibbels office with an elevated blood pressure of 170/110 and complaints of swelling and blotching of his ankles. Dr. Tibbels' diagnosis on April 13 was peripheral dermatitis secondary to hypertension.

Mr. Eyl was subsequently examined by Dr. Charles Dicken at the Mayo Clinic. (550:24-551:10) He diagnosed, and later testified, Mr. Eyl's condition as livedoid vasculitis, which condition was confirmed by a biopsy. (553:1-10) It was undisputed at trial that livedoid vasculitis is an idiopathic disease; i.e., the cause is unknown. (191, 586, 780, 1084 and 1221); (108:8-12; 383:19-22; 460:18-20; 555:17-23; 1084:11-13)

Dr. Tibbels, Dr. Stephen Papenfuss and Dr. Mark Thoman, a pediatrician and toxicologist, all testified over objection Mr. Eyl had hypersensitivity vasculitis and blamed Mr. Eyl's condition on Pramitol, even though it was undisputed Pramitol is a nonsensitizing product. (760:6-9; 760:19-20; 761:16-18; 762:5-6). Drs. Thoman and Pappenfuss admitted Eyl's symptoms were consistent with either hypersensitivity vasculitis or livedoid vasculitis. (TR775, 780, 781, 782, 591, 592, 596 and 5979) Like livedoid vasculitis, hypersensitivity vasculitis may be confirmed by a biopsy. Unlike Dr. Dickens' confirmed diagnosis of livedoid vasculitis, none of the doctors who testified at trial confirmed their diagnosis with a biopsy.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT IN THE FEDERAL APPELLATE COURTS AND VIRTUAL UNANIMITY IN STATE APPELLATE COURTS.

Since this Court's decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), "every federal court of appeals that has addressed the issue before us has . . . held that both failure-to-warn and labeling-based claims brought under common-law causes of action against manufacturers of pesticides are preempted by [7 U.S.C.] §136v." *Ackles v. Luttrell*, 252 Neb. 273, 561 N.W.2d 573, 577, *cert. denied*,

522 U.S. 928 (1997). The nine federal Courts of Appeals to so conclude have largely relied upon the *Cipollone* Court's holding that express preemption of state "requirements" normally encompasses not only positive enactments such as statutes and regulations, but also state requirements sought to be imposed through common law actions for damages.[1] No federal appellate court has held to the contrary.

This Court itself has indicated that *Cipollone* informs express preemption analysis under FIFRA. Shortly after it decided *Cipollone,* "the Court vacated two courts of appeals judgments that FIFRA *impliedly* preempted state law failure-to-warn claims and remanded for those courts to reconsider their decisions in light of *Cipollone*." *King v. E.I. DuPont de Nemours & Co.*, 996 F.2d 1346, 1349 (1st Cir. 1993) (emphasis added).[2] On remand, both courts held

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[1] *See, e.g., Netland v. Hess & Clark*, 284 F.3d 895, 898 (8th Cir.), *cert. denied*, 123 S. Ct. 315 (2002); *Hawkins v. Leslie's Pool Mart, Inc.*, 184 F.3d 244, 249 (3d Cir. 1999); *Andrus v. Agrevo USA Co.*, 178 F.3d 395, 398-99 (5th Cir. 1999); *National Bank of Commerce v. Dow Chem. Co.*, 165 F.3d 602, 607-08 (8th Cir. 1999); *Kuiper v. American Cyanamid Co.*, 131 F.3d 656, 661-62 (7th Cir. 1997), *cert. denied*, 523 U.S. 1137 (1998); *Grenier v. Vermont Log Bldgs., Inc.*, 96 F.3d 559, 562 (1st Cir. 1995); *Welchert v. American Cyanamid, Inc.*, 59 F.3d 69, 71 (8th Cir. 1995); *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555, 561 (9th Cir. 1995); *Lowe v. Sporicidin Int'l*, 47 F.3d 124, 129 (4th Cir. 1995); *MacDonald v. Monsanto Co.*, 27 F.3d 1021 (5th Cir. 1994); *Bice v. Leslie's Poolmart, Inc.*, 39 F.3d 887, 888 (8th Cir. 1994); *Worm v. American Cyanamid Co.*, 5 F.3d 744, 749 (4th Cir. 1993); *King v. E.I. DuPont de Nemours & Co.*, 996 F.2d 1346 (1st Cir.), *cert. dismissed*, 510 U.S. 985 (1993); *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 371 (7th Cir. 1993); *Papas v. Upjohn Co.*, 985 F.2d 516, 520 (11th Cir.), *cert. denied*, 510 U.S. 913 (1993); *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177, 1179 (10th Cir.), *cert. denied*, 510 U.S. 813 (1993).

[2] *See Papas v. Upjohn Co.*, 926 F.2d 1019 (11th Cir. 1991), *vacated and remanded*, 505 U.S. 1215 (1992); *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 959 F.2d 158 (10th Cir.), *vacated and remanded*, 506 U.S. 910 (1992).

that FIFRA expressly preempted state law failure-to-warn claims.[3]

State appellate courts have likewise applied the *Cipollone* court's preemption analysis to state common law claims. In addition to the Nebraska Supreme Court, numerous state appellate courts have held that FIFRA preempts labeling-based common law causes of action.[4]

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[3] *See Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993); *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir.), *cert. denied*, 510 U.S. 813 (1993). *See also King*, 996 F.2d at 1349 ("The Supreme Court has itself indicated that *Cipollone* applies to FIFRA preemption determinations."); *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555, 559 (9th Cir. 1995) ("The Supreme Court . . . has indicated that its analysis in *Cipollone* should be applied to FIFRA preemption determinations.").

[4] *See Traube v. Freund*, 773 N.E.2d 212 (Ill. App. 2002); *Dow Chemical Co. v. Ebling*, 753 N.E.2d 633 (Ind. 2001); *Etcheverry v. Tri-Ag Service, Inc.*, 93 Cal. Rptr. 2d 36 (Cal. 2000); *Goeb v. Tharaldson*, 615 N.W.2d 800 (Minn. 2000); *Lewis v. American Cyanamid Co.*, 715 A.2d 967 (N.J. 1998); *Ackles v. Luttrell*, 252 Neb. 273, 561 N.W.2d 573, *cert. denied*, 522 U.S. 928 (1997); *Barnes v. Sandoz Crop Protection Corp.*, 938 P.2d 95 (Ariz. App. 1997); *Romah v. Hygenic Sanitation Co.*, 705 A.2d 841 (Pa. Super. 1997), *aff'd*, 737 A.2d 249 (1999); *Eide v. E.I. DuPont de Nemours & Co.*, 542 N.W.2d 769 (S.D. 1996); *Buddington v. Sterling Winthrop, Inc.*, 1996 Conn. Super. LEXIS 2402 (Conn. Super. 1996); *Babalola v. Chrystal Chemicals Inc.*, 644 N.Y.S. 2d 1 (N.Y. App. 1996); *Hopkins v. American Cyanamid Co.*, 666 So. 2d 615 (La. 1996); *Gorton v. American Cyanamid Co.*, 533 N.W.2d 746 (Wis. 1995), *cert. denied*, 516 U.S. 1067 (1996); *Quest Chem. Corp. v. Elam*, 898 S.W.2d 819 (Tex. 1995); *Hochberg v. Zoecon Corp.*, 657 N.E.2d 1263 (Mass. 1995); *Wadlington v. Miles, Inc.*, 922 S.W.2d 520 (Tenn. App. 1995), *appeal denied* (1996); *Hue v. Farmboy Spray Co.*, 896 P.2d 682 (Wash. 1995); *Jenkins v. Amchem Products, Inc.*, 886 P.2d 869 (Kan. 1994), *cert. denied*, 516 U.S. 820 (1995); *Brennan v. Dow Chem. Co.*, 613 So. 2d 131 (Fla. App. 1993); *ICI Americas, Inc. v. Banks*, 440 S.E.2d 38 (Ga. App. 1993), *aff'd in relevant part*, 450 S.E.2d 671 (1994); *Moody v. Chevron Chem. Co.*, 505 N.W.2d 900 (Mich. App. 1993), *appeal denied*, 525 N.W.2d 450 (1994); *Hopkins v. Ciba-Geigy Corp.*, 432 S.E.2d 142 (N.C. App. 1993); *Yowell v. Chevron Chem. Co.*, 836 S.W.2d 62 (Mo. App.

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Petitioner attempts to focus this Court's attention on the isolated exceptions to this overwhelming authority. He is only able to cite, however, to one dated, discredited federal appellate court decision and two state court decisions. The federal court decision – *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984) – is inconsistent with this Court's subsequent opinions in *Cipollone* and *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996). Since *Cipollone,* courts have overwhelmingly concluded that "[r]eliance on *Ferebee* is misplaced because it is no longer good law." *Etcheverry v. Tri-Ag Services, Inc.*, 93 Cal. Rptr. 2d 36, 42 (2000).

In *Ferebee* the court held that, because a defendant could choose to ignore a jury verdict, common law claims do not impose "requirements" as that term is used in an express preemption clause. In *Cipollone*, this Court rejected this very analysis. The Court explained that common law damages actions necessarily impose "requirements because they are premised on the existence of a legal duty." *Cipollone*, 505 U.S. at 522. In reaching this conclusion, the *Cipollone* Court stressed that

> "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."

1992); *Davidson v. Velsicol Chem. Corp.*, 834 P.2d 931 (Nev. 1992) *cert. denied*, 507 U.S. 1051 (1993).

Cipollone, 505 U.S. at 521 (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)).[5] Although the District of Columbia Circuit has not expressly overruled *Ferebee*, it has acknowledged that *Cipollone* repudiated *Ferebee's* central premise by "explaining that damage actions can be used to enforce state regulations as effectively as other forms of preventive relief and thus damage actions must be preempted where positive enactments are preempted. . ." *Waterview Management Co., v. F.D.I.C.*, 105 F.3d 696, 699 (D.C. Cir. 1997).

Of the two state court opinions Petitioner cites, one relies on *Ferebee* and the other, from an intermediate appellate court, contains virtually no analysis whatsoever. *See Sleath v. West Mont Home Health Services, Inc.*, 16 P.3d 1042 (Mont. 2000), *cert. denied*, 122 S. Ct. 40 (2001) and *Brown v. Chas. H. Lilly Co.*, 985 P.2d 846 (Or. App. 1999), *rev. denied*, 6 P.3d 1098 (2000), respectively. Petitioner's reliance on *Sleath v. West Mont Home Health Services, Inc.*, 16 P.3d 1042 (Mont. 2000) to suggest that a state court damage is not a requirement as that word is used in section 136v(b) is particularly misdirected.[6] Neither of the two aberrant state court decisions is sufficient to create a significant conflict among the lower courts,

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[5] In *Cipollone*, three Justices cited *Ferebee* in support of their dissent from the Court's holding that the later of the two statutes considered by the Court (the 1969 Act) preempted common law claims. 505 U.S. at 537 (Blackmun, J., concurring in part and dissenting in part). This opinion makes clear that the Court has already considered, and rejected, the unduly narrow view of preemption represented by *Ferebee*.

[6] The California Supreme Court recognized that position has been rejected as "sophistry" and "silly" and the attempted distinction has been characterized as "illusory." *Etcheverry v. Tri-Ag Services, Inc.*, 22 Cal. 4th 316, 93 Cal. Rptr. 2d 36, 993 P.2d 366 (2000).

particularly given the fact that, since *Cipollone*, the appellate courts of at least 24 states have reached a conclusion consistent with the federal courts.

This Court recently denied a petition for writ of certiorari filed on behalf of a personal injury plaintiff in *Netland v. Hess & Clark*, 284 F.3d 895 (8th Cir. 2002), *cert. denied*, 123 S. Ct. 315 (2002). Public Citizen Litigation Group, the counsel of record in *Netland*, requested the Court to review the Eighth Circuit's refusal to overturn its previous opinions holding that 7 U.S.C. §136v(b) of FIFRA expressly preempts labeling-related requirements imposed by state law failure-to-warn claims. Now, in its virtually identical position in this case, Public Citizen Litigation Group asserts the same theories against FIFRA preemption of failure-to-warn claims[7] – theories which federal and state appellate courts have repeatedly rejected – urging this Court to review, despite the near unanimity among the lower courts, the well established principle that FIFRA expressly preempts failure-to-warn and other labeling-related damages claims. There is no more reason for the Court to grant review in this case than there was in *Netland*.[8]

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[7] *Compare* Brief of Petitioner at 3-7, 11-14, 18-26, *Netland v. Hess & Clark, Inc.*, 123 S. Ct. 315 (2002) (No. 02-219) *with* Pet. at 3-7, 13-17 and 20-30.

[8] Petitioner attempts to piggy-back the Court's invitation to the Solicitor General to express the views of the United States in *American Cyanamid Co. v. Geye*, No. 02-367, (*petition for cert. pending*) by suggesting this case is a better vehicle to address FIFRA preemption issues. In *American Cyanamid Co. v. Geye*, the question presented is whether state law damage claims for pesticide-related agricultural crop injuries are preempted by FIFRA. The Court's invitation to the Solicitor General must relate to the nature of the property damage claim in that case and the position the Solicitor General took in the *Etcheverry* case,

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II. THE NEBRASKA SUPREME COURT CORRECTLY DETERMINED FIFRA PREEMPTS FAILURE-TO-WARN CLAIMS BASED ON A THEORY THAT A DEFENDANT SHOULD HAVE WARNED THROUGH MEANS OTHER THAN LABELING.

As grounds for review, Petitioner asserts, as he did below, FIFRA preemption does not apply to his claim because he was not the applicator of the pesticide but instead was a bystander. In rejecting that argument, the Nebraska Supreme Court assumed, but did not decide, Mr. Eyl was a bystander. That fact is, however, immaterial. The overwhelming majority of FIFRA preemption cases do not distinguish between claims brought by pesticide applicators or users and those brought by so-called bystanders. *See, e.g., Cuevas v. E.I. Du Pont de Nemours & Co.,* 956 F. Supp. 1306 (S.D. Miss. 1997) (claim by truck driver who alleged he was accidentally sprayed by a pesticide being applied to the roadside); *Ackles v. Luttrell*, 252 Neb. 273, 561 N.W.2d 573, *cert. denied*, 118 U.S. 329 (1997) (claim by mail carrier who alleged he was exposed to a pesticide being sprayed on an adjacent cornfield); *Traube v. Freund*, 775 N.E.2d 212 (Ill. App. 2002) (claim by pond owner who alleged his trophy-grade bluegill fish were killed by runoff from a pesticide applied to neighboring farmland); *Hue v. Farmboy Spray Co.,* 896 P.2d 682

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which was repudiated by the California Supreme Court, the Eighth Circuit Court of Appeals, and the Nebraska Supreme Court. The issue is whether there is an exception to the principal in failure-to-warn claims involving agricultural crop damage or other subjects which EPA does not normally review at the time it approves a pesticide product label. On that question, *American Cyanamid Co. v. Geye* is a more appropriate case for this court to review rather than *Eyl*.

(Wash. 1995) (claim by landowners who alleged that agricultural pesticides drifted onto their homes and farms damaging their plants and crops); *Eriksen v. Mobay Corp.*, 41 P.3d 488 (Wash. App. 2002) (claim by farmer who alleged that he suffered personal injuries caused by aerial drift from a pesticide application on a neighboring farm); *June v. Laris*, 618 N.Y.S.2d 138 (N.Y. App. 1994) (claim by firefighter who alleged he was accidentally exposed to a pesticide that was being applied on a farm). *See, e.g., Grenier v. Vermont Log Buildings, Inc.*, 96 F.3d 559 (1st Cir. 1996) (purchasers of home built with logs treated with wood preservative); *Walker v. American Cyanamid, Inc.*, 59 F.3d 69 (8th Cir. 1995) (lessees of farmland previously treated with herbicide); *Lescs v. Dow Chemical Co.*, 976 F. Supp. 393 (W.D. Va. 1997) (purchaser of house treated with insecticide in connection with sale); *Goeb v. Tharaldson*, 650 N.W.2d 800 (Minn. 2000) (renters of the house previously treated with an insecticide).

Petitioner's bystander argument is also based on *Chemical Specialties Manufacturers Ass'n, Inc. v. Allenby,* 958 F.2d 941, 944 (9th Cir.), *cert. denied,* 113 S. Ct. 80 (1992); and *New York Pesticide Coalition, Inc. v. Jorling,* 874 F.2d 115 (2nd Cir. 1989), violates the holding in those cases. Subsection (a) of FIFRA's preemption provision, 7 U.S.C. §136v(a) provides that "[a] State may regulate the sale or use of any federal registered pesticide . . . ." Consistent with §136v(a), *Allenby* and *Jorling* hold that states may regulate pesticide *use* by requiring the *user* to inform bystanders or other third parties. In contrast, subsection (b) of the preemption provision, 7 U.S.C. §136v(b), the subsection at issue in this case, provides that states may not require labeling in addition to or different from those required by federal law. The provision is not limited to EPA's requirements as to what particular warnings must

appear on a pesticide's label. It also encompasses any requirements set forth on the labeling as to which of those warnings, if any, must be provided directly *to the public and by whom.*

FIFRA places that duty, if any, on the user or applicator. Part 170 of Chapter 40 of the Code of Federal Regulations contains the EPA's requirements concerning notification or warning that a particular product has been applied. The representative of Northeast Cooperative testified over relevancy and Rule 403 objections that it began providing warnings signs concerning reentry in 1996 when the label of the herbicide requires that reentry signs be posted. (854:8-855:12; 855:22-856:15) 40 C.F.R. §170.3.

More importantly, this higher duty to warn, instruct or inform bystanders gleaned from *Allenby* and *Jorling* is contradicted by FIFRA's definition of labeling and the structure and purpose of the statute. FIFRA's definition of "labeling" is extremely broad encompassing "all labels and all other written, printed, or graphic matter . . . (A) accompanying the pesticide . . . at any time; or (B) to which reference is made on the label or in literature accompanying the pesticide." 7 U.S.C. §136(p)(2). By its own terms the definition includes not only all "written, printed, or graphic matter" "accompanying the pesticide", but also all "written, printed, or graphic matter" "to which reference is made on the label or in literature accompanying the pesticide." 7 U.S.C. §136(p)(2). Consequently, Petitioner's argument would require additional warnings totally outside the scope of the warnings reviewed and approved by EPA. That places a distributor such as Northeast Cooperative between the proverbial rock and a hard place because FIFRA prohibits Northeast Cooperative under

penalty of federal law from giving any warnings without the EPA's approval.

Furthermore, requiring additional non-label warnings would undermine the very reason for establishing the EPA's uniform labeling review and approval process. Other courts have rejected similar arguments that non-label warnings should be required, concluding that such claims necessarily challenge the EPA-approved warnings. As stated by the Eleventh Circuit:

> Appellants urge us to hold that their warning claims "unrelated to labeling and packaging" are not preempted by section 136v . . . . But any claims that point-of-sale signs, consumer notices, or other informational materials failed adequately to warn the plaintiff necessarily challenge the adequacy of the warnings provided on the product's labeling or packaging. If a pesticide manufacturer places EPA-approved warnings on the label and packaging of its product, its duty to warn is satisfied, and the adequate warning issue ends. Plaintiff may not interfere with the FIFRA scheme by bringing a common law action alleging the inadequacy of, for example, point-of-sale signs. Because claims challenging the adequacy of warnings on materials other than the label or package of a product necessarily imply that the labeling and packaging failed to warn the user, we conclude that these claims are also preempted by FIFRA.

Papas v. Upjohn Co., 985 F.2d 516, 519 (11th Cir. 1993) ("Papas II") (emphasis added). The Ninth Circuit reached the same conclusion, holding that plaintiffs' claim based on the absence of such non-label warnings was "preempted because their claim is premised ultimately upon the inadequacy of the product label." *Taylor AG Industries v. Pure-Gro*, 54 F.3d 555, 561 (9th Cir. 1995).

III. THE NEBRASKA SUPREME COURT CORRECTLY HELD THAT FIFRA EXPRESSLY PREEMPTS PETITIONER'S COMMON LAW LABELING CLAIMS.

The language of FIFRA's preemption clause, EPA's pervasive and comprehensive regulation of pesticide labeling, and this Court's precedents all support the decisions of the nine federal appellate courts and the 24 state courts upholding preemption, including the decision below.

A. FIFRA Gives EPA Exclusive Authority to Regulate Pesticide Labeling.

To promote the goals of FIFRA, Congress vested in EPA the exclusive authority to regulate the content of pesticide labeling. In its exercise of this authority, EPA has established a comprehensive regulatory scheme to ensure the proper content of pesticide labeling. Before a pesticide may be sold in the United States, it must be registered and its labeling approved by EPA. 7 U.S.C. §136a(a). To secure registration, an applicant must submit proposed "labeling" for the product to EPA. 7 U.S.C. §136a(c)(1)(C). The term "label" is broadly defined by FIFRA as "the written, printed or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers". 7 U.S.C. §136(b). The term "labeling" includes "all labels and all other written, printed or graphic matter (a) accompanying the pesticide. . . . at anytime; or (b) to which reference is made on the label or in literature accompanying the pesticide. . ." 7 U.S.C. §136p(2). From this language, it is clear that Congress intended to pre-empt state common law actions that would impose requirements on a registrant to disseminate additional written material with its product; e.g., admonishments, warnings, precautions,

literature, postings, flags, brochures, safety materials, information regardless of whether the matter was identical to the EPA-approved labeling information.

Under FIFRA, it is unlawful for any person, including a manufacturer, to alter EPA-approved labeling in any way without EPA's prior approval. *See* 7 U.S.C. §136j(a)(2)(A). As a result, neither pesticide manufacturers nor anyone else are free to add additional warnings on their own after a particular label has been approved. EPA's regulations require that any proposed labeling change requiring consideration of scientific data (such as additions or modifications of a warning or precaution) must be reviewed and approved by EPA in advance. *See* 40 C.F.R. §152.81(b)(4). In addition, submission of additional unreasonable adverse effects is required by EPA after a pesticide has been registered. *See* 40 C.F.R. §159.184. Such adverse effects information can lead to EPA-imposed labeling changes. *See* 43 Fed. Reg. 37,611, 37,613 (1978).

EPA may not register a pesticide or approve its labeling unless the agency finds that the product does not pose any "unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of [its] use." 7 U.S.C. §136(bb). In registering Pramitol and approving its labeling, EPA necessarily concluded that this standard was satisfied.

B. FIFRA's Preemption Clause Expressly Prohibits State-Imposed Labeling Requirements, Including those Imposed Through the Common Law.

Under the analysis this Court established in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992), EPA's exclusive federal regulation of pesticide labeling expressly

preempts any state-imposed pesticide labeling requirements, as the federal and state appellate courts have recognized. In *Cipollone*, the Court interpreted the preemption clause in the Public Health Cigarette Smoking Act of 1969 ("PHCSA"), which preempted "*requirement[s]* or prohibition[s] based on smoking and health . . . with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." 505 U.S. at 515 (quoting §5(b) of PHCSA) (emphasis added). The Court held that the use of the word "requirement" indicated Congress's intent to preempt state common-law labeling claims. *Cipollone*, 505 U.S. at 521-25.

Like the PHCSA, FIFRA demonstrates that Congress intended to preempt state common-law claims premised on allegedly inadequate pesticide labeling. In 7 U.S.C. §136v, Congress confirmed that the states may regulate the sale or use of EPA-registered pesticides, but expressly prohibited any state from establishing independent labeling or packaging requirements:

> §136v Authority of States
>
> (a) In general
>
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
>
> (b) Uniformity
>
> Such State shall not impose or continue in effect any *requirements* for labeling or packaging in addition to or different from those required under this subchapter.

7 U.S.C. §136v (emphasis added). As all of the Courts of Appeals and nearly all of the state appellate courts cited

above have held, FIFRA's preemption of state "requirements" indicates Congress' intent to displace labeling requirements imposed by state statutes, regulatory enactments and common law. *See* cases cited at notes 2 and 5.

Petitioner tries to attach great significance to the fact that under FIFRA, the pesticide registrant submits proposed labeling, while Congress drafted the warning language at issue in *Cipollone*. Of course, the reason Congress did not mandate the precise language of pesticide labeling in FIFRA is because it would be completely impractical to do so. Unlike products such as cigarettes, which are relatively uniform and amenable to across-the-board warnings for the hazards they pose, each pesticide product differs in terms of its unique combination of active and inert ingredients, physical and chemical characteristics, formulation type, environmental behavior, use patterns, and toxicity.[9]

Petitioner does not dispute that EPA retains exclusive authority over pesticide labeling, as discussed above in Part II(A). This comprehensive EPA control over labeling helps to demonstrate why the courts have so uniformly concluded that *Cipollone* governs the interpretation of FIFRA's preemption clause.

Four years after deciding *Cipollone*, this Court returned to express preemption analysis, reaffirming the essential principles of *Cipollone* in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996). In *Medtronic*, a five-Justice majority

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[9] "FIFRA cannot impose a specific language requirement for warning labels like the 1969 Cigarette Act because FIFRA regulates a wide variety of products that cannot be serviced by a single statement." *Taylor Ag Indus. v. Pure-Gro*, 54 F.3d 555, 560 (9th Cir. 1995).

reaffirmed *Cipollone's* holding that "state common-law damages actions *do impose 'requirements'* and are therefore pre-empted where such requirements would differ from those imposed by [statute]." *Medtronic*, 518 U.S. at 509 (O'Connor, J.); *id.* at 504-05 ("ordinarily, insofar as the MDA pre-empts a state requirement embodied in a state statute, rule, regulation, or other administrative action, it would also pre-empt a similar requirement that takes the form of a standard of care or behavior imposed by a state-law tort action") (Breyer, J.).

The divided *Medtronic* Court held that the Medical Device Amendments of 1976 (the "MDA") did not preempt plaintiffs' claims premised on the alleged defectiveness of a pacemaker. The Court's decision was based in large part upon the cursory review given the particular medical device by the Food and Drug Administration ("FDA"). Pursuant to 21 U.S.C. §360(k) (§510K of the MDA), a manufacturer of a medical device may avoid the MDA's rigorous and time-consuming pre-market approval process by demonstrating to the FDA that a device is "substantially equivalent" to a device already on the market before the MDA's 1976 effective date. Essentially a "grandfathering" clause, this "§510k process" "requires little information, rarely elicits a negative response from the FDA, and gets processed very quickly." *Medtronic*, 518 U.S. at 479.

One striking difference between Medtronic's MDA preemption and the FIFRA preemption at issue here lies in the differing regulatory role of the federal agencies assigned with implementing the statutes. As Justice Stevens explained in *Medtronic*:

> Unlike the statute construed in *Cipollone*, for instance, pre-emption under the MDA does not arise directly as a result of the enactment of the statute; rather, in most cases a state law will be pre-empted only to the extent that the FDA has

> promulgated a relevant federal 'requirement.' . . . Congress explicitly delegated to the FDA the authority to exempt state regulations from the preemptive effect of the MDA – an authority that necessarily requires the FDA to assess the preemptive effect that the Act and its own regulations will have on state laws.

518 U.S. at 496-97. In distinguishing MDA preemption from FIFRA preemption, the Nebraska Supreme Court recognized that "the preemption language employed in FIFRA [is] more similar to the statutory language in *Cipollone* than the statutory language in *Medtronic.*"[10]

Another significant difference between FIFRA preemption and the preemption this Court rejected in *Medtronic* involves the level of scrutiny with which the responsible agency reviews the subject product. Petitioner incorrectly suggests that the EPA-approval process is conducted without any view toward public safety. This simply is not so. EPA's review of pesticide labeling is much more thorough than the FDA's review of §510k medical devices, in which the safety of the device is not even

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[10] *Eyl v. Ciba-Geigy Corp.*, 264 Neb. 582, 650 N.W.2d 744 (2002). The California Supreme Court also noted "the overwhelming majority" of courts have held that "*Medtronic* does not undermine the conclusion that FIFRA preempts state failure-to-warn claims." *Etcheverry v. Tri-Ag Service, Inc.*, 93 Cal. Rptr. 2d 36, 44 (2000). In addition to *Etcheverry*, the "overwhelming majority" includes, e.g., *Grenier v. Vermont Log Bldgs, Inc.*, 96 F.3d 559-563 (1st Cir. 1996); *Lewis v. American Cyanamid Co.*, 715 A.2d 967, 973 (N.J. 1998); *Oliver v. Reckitt & Coleman, Inc.*, 12 F. Supp. 2d 1287, 1291 (M.D. Fla. 1998); *Kuiper v. American Cyanamid Co.*, 960 F. Supp. 1378, 1384 (E.D. Wis. 1996); *Koch v. Shell Oil Co.*, 173 F.R.D. 288, 289 (D. Kan. 1997); *Ackerman v. American Cyanamid Co.*, 586 N.W.2d 208, 212 (Iowa 1998); *Sherman v. Claire Mfg. Co.*, 657 N.Y.S.2d 453, 454 (N.Y. App. Div. 1997); *Ackles v. Luttrell*, 561 N.W.2d 573, 579 (Neb. 1997); and *Didier v. Drexel Chem. Co.*, 938 P.2d 364, 367 (Wash. Ct. App. 1997).

considered. As part of the FIFRA registration process, EPA must ensure that the pesticide's labeling is adequate to protect the health and safety of anyone who uses or may be exposed to the pesticide. *See* 7 U.S.C. §136a(c)(5). The *Medtronic* Court's concern, then, with the cursory nature of the §510k approval process simply has no application to the FIFRA preemption analysis.[11]

Petitioner mistakenly cites *Medtronic* for the proposition that there is no preemption here because the state law damages claim is "based on duties that parallel requirements imposed under FIFRA." Pet. at 29. Petitioner contends that the EPA-approved labeling did *not* provide him with adequate warnings to ensure his safety. "FIFRA does not allow states to second-guess EPA's labeling decisions under the guise of enforcing the requirements of FIFRA itself." *Kuiper v. American Cyanamid Co.*, 131 F.3d 656, 666 (7th Cir. 1997), *cert. denied*, 523 U.S. 1137 (1998).

Petitioner also relies heavily on a position taken by the Justice Department as *amicus curiae* in two cases, one in which the plaintiffs alleged the pesticide did not work and the other in which plaintiffs alleged the pesticide damaged their crops. *See Etcheverry v. Tri-Ag Service,* 93 Cal. Rptr. 2d 36 (Cal. 2000); *Hart v. Bayer Corp.*, 199 F.3d 239 (5th Cir. 2000). The government's position (a) was

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[11] *See Lewis v. American Cyanamid Co.*, 682 A.2d 724, 731 (N.J. Super 1996) ("FIFRA has no escape clauses like the 'grandfathering' and 'substantially equivalent' provisions of the MDA. The statute and regulations provide that substantially all pesticides are subject to extensive review by the EPA, and the EPA prescribes precise content for pesticide labels . . . "), *aff'd*, 715 A.2d 967 (N.J. 1998) ("[u]nlike the MDA, . . . FIFRA imposes specific labeling language on insecticide products").

never raised by the government until 1999, after years of uniform holdings to the contrary; (b) was rejected by the California Supreme Court in *Etcheverry*,[12] and (c) has not been advocated by the government since *Etcheverry*. In *Eyl v. Ciba-Geigy Corp.*, 264 Neb. 582, 650 N.W.2d 744 (2002), the Nebraska Supreme Court rejected arguments similar to plaintiff's here that rely on the Justice Department's *amicus curiae* brief in *Etcheverry*:

> [W]e give no deference to the EPA's position to the *amicus* brief in *Etcheverry*. The *Etcheverry* brief was written for that specific case. The EPA did not file an *amicus* brief with the court in this case . . . . In addition, the record is silent whether the view expressed in the *Etcheverry* brief was an official EPA policy statement for all cases and if the EPA still adheres to that view. Further, we note that in *Etcheverry*, the California Supreme Court did not adopt the EPA's arguments. . . . Under these circumstances, we give no deference to the position taken in the *Etcheverry* brief.[13]

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[12] In *Hart*, the issue before the court was whether the defendants properly removed the case to federal court under the "complete preemption doctrine." The Fifth Circuit held that because FIFRA preemption did not provide a "complete" defense to all pesticide claims, but instead was limited to warning and labeling claims, complete preemption did not obtain. 199 F.3d at 244-46. Notably, the Fifth Circuit's holding that FIFRA preempts labeling claims, reached in *MacDonald v. Monsanto*, 27 F.3d 1021 (5th Cir. 1994), was not questioned in *Hart*, nor has it been since.

[13] The *Eyl* Court further cited with approval the Eighth Circuit Court of Appeals' decision in *Netland v. Hess & Clark*, 284 F.3d 895, 858 (8th Cir.), *cert. denied*, 123 S. Ct. 315 (2002) rejecting plaintiff's request that the court overrule FIFRA preemption precedent based on *Medtronic*, *Sleath* and *Brown* and on the EPA's brief in *Etcheverry*. *Id.* at *25.

Petitioner's position that his claims are not preempted because Ciba-Geigy could have warned through means other than the labeling, Pet. at 26-28, is likewise inconsistent with FIFRA and the vast majority of courts that have interpreted it. The Pramitol 5PS labeling contains all the warnings a user needs to utilize the product safely. A common law claim based on the premise that Ciba-Geigy should have provided different warnings through other channels "necessarily impl[ies] that the labeling and packaging failed to warn the user." *Papas v. Upjohn Co.*, 985 F.2d 516, 520 (11th Cir.), *cert. denied*, 510 U.S. 913 (1993).

Similarly, Petitioner's discussion of the legislative history of the 1972 amendments to FIFRA does not call into question the consistent case law rejecting his position. In a straightforward application of an elementary canon of statutory construction, the "plain wording" of an express preemption clause "necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). Case after case has held that the plain wording of 7 U.S.C. §136v(b) both encompasses and preempts state law failure-to-warn claims.

In fact, the legislative history *supports* the conclusion that FIFRA preempts common law claims. For example, the original House Report by the Agriculture Committee provides that "[I]n dividing the responsibilities between the States and the Federal Government for the management of an effective pesticide program, the [House Agriculture] Committee has adopted language which is intended to completely preempt State authority in regard to labeling and packaging." *Id.* at 16. Just as important, "none of the legislative history distinguishes legislative enactments from common law" *MacDonald*, 27 F.3d at 1025 n.3. In

view of 7 U.S.C. §136v(b)'s express preemption of additional or different labeling requirements, it is reasonable to assume that if Congress wanted to save damages claims from preemption, it would have said so in the statute or in the legislative history.

IV. PETITIONER'S CLAIMS ARE ALSO IMPLIEDLY PREEMPTED BY FIFRA.

While Petitioner's claims against Ciba-Geigy are expressly preempted by 7 U.S.C. §136v(b), a submission of those claims to an implied preemption analysis yields the same result.[14] Under its FIFRA-delegated authority, EPA has provided that "[a] registrant may distribute or sell a registered product with the composition, packaging and labeling currently approved by the agency." 40 C.F.R. §152.130(a). Because federal law permitted Ciba-Geigy to sell Pramitol with the particular chemical composition and labeling at issue, imposition of liability on respondents for the exercise of this option would conflict with the regulatory structure of FIFRA. "[A] state cannot impose common law damages on individuals for doing what a federal act or regulation 'authorized them to do.'" *Irving v. Mazda Motor Corp.*, 136 F.3d 764, 769 (7th Cir.) (quoting *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981)), *cert. denied*, 525 U.S. 1018 (1998).

Under well-settled jurisprudence from this Court, "a federal statute implicitly overrides state law either when

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[14] In *Geier v. American Honda Motor Co.*, 529 U.S. 861, 869-70 (2000), this Court held that the existence of an express preemption clause in a statute does not foreclose the application of implied conflict preemption analysis with respect to that statute. *See also Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 352 (2001).

the scope of a statute indicates that Congress intended federal law to occupy a field exclusively, or when state law is in actual conflict with federal law." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995). Implied conflict preemption exists, as here, "where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (quoting *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941)). Congress's desire for uniformity would be undermined if, after EPA approved the composition and labeling of Pramitol, the product's manufacturer found itself subject to an array of state common law actions challenging the product's composition and labeling.

CONCLUSION

Both federal and state appellate courts have unanimously concluded that in *Cipollone*, this Court essentially decided the very issue raised in this petition. Merely alleging that a claim is not a label-based claim does not avoid FIFRA's express preemption clause. In this case, petitioner has semantically reworked a claim to assert it is non-label based when essentially it is nothing more than another attack on the label's failure to warn against the dangers of coming in contact with the product and an indirect attempt to impose label requirements in addition to or different from those imposed by the EPA. FIFRA preempts exactly those types of claims regardless of the form in which they appear.

The decision of the Nebraska Supreme Court is one in a long line of decisions that follow an unbroken line of authority which have held that FIFRA preempts state claims for damages that are premised on an allegation that pesticide labeling approved by EPA is inadequate.

The Nebraska Supreme Court fully considered and correctly decided the issue Petitioner seeks to raise in this Court. Respondents Ciba-Geigy Corporation and Northeast Cooperative respectfully ask that this Court deny the petition for writ of certiorari.

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